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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Communication No. 2/2010

Views adopted by the Committee at its eleventh session (31 March–11 April 2014)

Submitted by:	Liliane Gröninger (not represented by counsel)
Alleged victims:	The author, her son Thomas Gröninger and her husband, Erhard Gröninger
State party:	Germany
Date of communication:	25 June 2010 (initial submission)
Document references:	Special Rapporteur's rule 70 decision, transmitted to the State party on 20 September 2010 (not issued in document form); decision of admissibility adopted on 18 September 2012 (CRPD/C/8/D/2/2010)
Date of adoption of Views:	4 April 2014
Subject matter:	Failure to promote the right to work by failing to facilitate the inclusion of a person with disabilities into the labor market
Procedural issues:	Admissibility of claims
Substantive issues:	General principles, general obligations, equality and non-discrimination; awareness-raising; work and employment
Articles of the Convention:	3, 4, 5, 8 and 27
Articles of the Optional Protocol:	2 (d) and (e)

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Annex

Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (eleventh session)

concerning

Communication No. 2/2010

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The Committee on the Rights of Persons with Disabilities, established under article 34 of the Convention on the Rights of Persons with Disabilities,

Meeting on 4 April 2014,

Having concluded its consideration of communication No. 2/2010, submitted to the Committee on the Rights of Persons with Disabilities by Liliane Gröninger under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5 of the Optional Protocol

1.1 The author of the communication is Liliane Gröninger, a French national, who is submitting it on behalf of her son, her husband and herself. The author's son is a German national, born on 14 May 1979, and is a person with a disability. She claims that her son is a victim of violations by Germany of his rights under articles 3, 4, 8 and 27 of the Convention on the Rights of Persons with Disabilities (the Convention). Although the author does not invoke it specifically, the communication appears also to raise issues under article 5 of the Convention. The Optional Protocol to the Convention entered into force for Germany on 26 March 2009. The author is unrepresented.

1.2 On 18 September 2012, during its eighth session, the Committee on the Rights of Persons with Disabilities decided, in accordance with rules 65 and 70 of its rules of procedure, to consider the questions of admissibility and the merits of the communication separately.[1] The Committee declared the communication admissible with regard to the claim that the application of the social legislation to the inclusion of her son in the labour

[1] See the Committee's decision of admissibility (CRPD/C/8/D/2/2010).

market raised issues under articles 3, 4 and 27 of the Convention. It also considered that the communication raised issues under article 5 of the Convention.

1.3 In accordance with rule 70, paragraph 10, of its rules of procedure, the Committee requested the parties to submit additional written explanations with regard to the following issues:

(a) Whether the court or any other body had investigated the allegations of discrimination against the author's son;

(b) Whether the courts or any other body of the State party had investigated the allegations of the author's son, brought by him before the Social Court of Cologne, in particular those related to the inclusion of erroneous information in the case files of the employment agencies;

(c) What concrete steps had been taken by the State party's authorities to ensure that the author's son had effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(d) Whether the author's son would have received a different kind of assistance with regard to his inclusion in the labour market if he had attended specialized schooling and training programmes for persons with disabilities;

(e) What concrete steps, relevant to the situation of the author's son, other than a general evaluation of his case, had been taken by the various employment agencies to which the author's son had been assigned since 2009, in order to assist him to acquire work experience and to facilitate his inclusion in the open labor market;

(f) What were the main obstacles that the federal employment agencies, in charge of the author's son's case, faced with regard to his successful inclusion in the labour market;

1.4 The parties were also requested to provide:

(a) Information on the employment offers the author's son had allegedly received since 2009;

(b) A copy of the letter, dated 17 May 2011, from the Social Court, informing the author that part of her son's case file had been lost;

(c) Information on whether the "integration subsidies" are the only affirmative action measure put in place by the State party to assist the inclusion of persons with disabilities in the labour market, or whether there are other measures in place that the author's son could have made use of; in the latter case, the parties were also requested to provide information on whether the author's son was advised of the existence of those measures and what the reasons were for not applying such measures in his case.

Author's submission on the merits

2.1 On 5 February 2013, in response to question (a)[2] the author submits that no court or other body has investigated the allegations of discrimination against her son.

2.2 The author also submits that in November 2009 she had a meeting with the head of the Specialist Integration Service (Integrationsfachdienst, IFD) and a representative of the Cologne Integration Office from the Rhineland Regional Authority, at which she reported "discrimination against disabled people in their integration into the labour market". The

[2] For the list of questions referred to in this section, see para. 1.3 above.

author submits that the "discrimination was unequivocally confirmed" and that she was told that the Regional Authority had no legal means to help her son.

2.3 In response to question (b), the author submits that no court or other body had investigated her allegations of erroneous information in the case files of the employment agencies. She maintains that her son had been registered with the employment agencies since 2002 and that they had to "contest or correct almost (all their) letters". She also maintains that the methods used by the employment agencies to prevent inclusion are "systematic, sophisticated and perfidious" but, since the social courts are not criminal courts, false statements by officials "have no legal consequences".

2.4 In response to question (c), the author submits that her son had no access to general technical, continuous and vocational guidance and training programmes or to placement services. She maintains that her son was seeing a speech therapist and a physiotherapist and trained in a local table tennis club to maintain his mental and physical capabilities and that the family financed those activities. In October/November 2009, he also attended and successfully completed a vocational cashier's course, but the employment agency refused to provide financial support, with the argument that the training was not cost-effective. The author submits that the lawsuit initiated on that issue has been pending in the Social Court of Cologne for over three years. In March/April 2010 and April/May 2011, the author's son took part in a bookkeeping and accounting course and the family covered the cost again, since neither the training nor financial support were forthcoming from the employment agency. The author maintains that the aim of the employment agency was to disadvantage disabled persons so that after a few years of unemployment they were no longer able to offer anything to the labour market and could then be "pushed away into a workshop for the disabled". The author further submits that her son received neither support nor assistance from the employment agency when looking for a job. The author submits a list of 10 positions for which her son applied and was interviewed, and alleges that after contacting the employment agency, potential employers turned his applications down. She further submits that the employment agency's efforts to assist were limited to sending her son "offers", which were in fact general calls for applications from companies and were often out of date or unsuitable for his needs.[3]

2.5 The author maintains that every measure the employment agency takes is bound to fail because, under section 219 of book III of the Social Code, her son is eligible for an integration subsidy only if his full working capacity can be restored within three years. She maintains that the social legislation prevents inclusion in the labour market.

2.6 In response to question (d), the author submits that her son attended a normal kindergarten and school and that she trained to provide and provided him with additional therapy. She submits that he managed to graduate from a normal high school (*Fachoberschulreife*) despite the many obstacles. She further describes the problems her son faced during his vocational training and maintains that the employment agency assigned him to a training provider who was not authorized to train disabled persons and that his apprenticeship would not have been recognized even if he had successfully passed the final exam. He changed the training provider and managed to finalize his vocational training despite the fact that he requested but was not granted a "rehabilitation measure".

2.7 In response to question (e), the author submits that her son did not receive any assistance from either of the employment agencies he was registered with to acquire work experience or to facilitate his inclusion in the labour market.

[3] The author submits as an example a letter sent by the employment agency that contained an advertisement from Lidl which was three months old.

2.8 In response to question (f), the author submits that the main obstacles faced by the employment agencies are the social legislation in force and the division of responsibilities between different government bodies for the inclusion of persons with disabilities in the labour market. She submits that she asked a legal expert to explain the legal options for and limitations to the successful intervention of employment agencies to promote the inclusion of persons with disabilities in the labour market. The expert stated:

> In case of a disability that impairs working capacity not just temporarily, inclusion in the labour market cannot normally be supported by the integration allowance, as the benefit is typically not appropriate in such a case to achieve the legally defined objective. This shortcoming in the legal implementation of the support concept has a profound effect on those concerned, since there is not normally any other benefit through which inclusion in the labour market could be supported in a similar way. As a result, participation in working life is practically impossible for those concerned.[4]

2.9 In response to the request for information on employment offers received,[5] the author submits that, when applying for jobs, her son can only introduce himself to a store manager and submit his application. Thereafter his fate lies in the hands of the employment agency. Since according to the social legislation her son is not eligible for an integration subsidy, after making contact with the employment agency the potential employers withdrew their offers. The author submits that disabled persons are not treated equally as compared to persons without disabilities when they apply for jobs and that the federal Government is concealing the fact that the social legislation is preventing their integration into the labour market.

2.10 In response to the request for the letter regarding the loss of part of her son's case file, the author submits copies of a letter from the employment agency to the Social Court, dated 12 May 2011, and of a letter from the Social Court, dated 17 May 2011. According to a phone conversation with an employee of the Social Court, the Court intended to recreate the missing files in collaboration with the employment agency, based on recollections by its staff.

2.11 In response to the request for information on integration subsidies, the author submits that the integration subsidy is the only affirmative action available to assist her son with his inclusion in the labour market. She reiterates that he has a number of qualifications, but that his integration into the labour market has failed because of the social legislation in force in the State party.

State party's further observations

3.1 On 15 May 2013, the State party requested the Committee to revise its admissibility decision.

3.2 In relation to the court proceedings regarding the granting of integration subsidies, the State party maintains that the imposition of the court costs for a wanton claim is not a punishment or a fine and that it only occurs "in case of a wanton pursuance of rights after the court has made an appropriate indication". In the present case, those costs amounted to 375 euros and "did not constitute a considerable deterrent and an obstacle for the author's son to pursue his rights". The request for a declaratory judgment before the Social Court of Cologne and at second instance before the Regional Social Court in Rhine-Westphalia was

[4] The expert the author asked for opinion is Dr.jur. Felix Bunge from the Free University of Berlin. The quotation appears to be from his assessment (unofficial translation provided by the author).

[5] For a list of the requests for information, see para. 1.4 above.

"wanton because the author had no legal interest in a finding, since only employers are legally entitled to claim integration subsidies". The State party argues that the employment agency never denied the possibility of granting an integration subsidy should the legal conditions be met.

3.3 The State party further refers to the jurisprudence of the Committee against Torture, according to which it is not within the scope of the Committee's competence to evaluate the prospects of success of domestic remedies, but only whether there were remedies available for the determination of a claim.[6] It also highlights that the author's son was not prevented from applying to the Federal Court or the Federal Constitutional Court, which have jurisdiction in the matter. The State party makes reference to the case law of the European Court of Human Rights, which considered that the risk to bear the costs of the proceedings in case applications were declared inadmissible was inherent in all court proceedings.[7]

3.4 The State party maintains that the author's son had failed to exhaust available domestic remedies with regard to several issues. Firstly, the assumption of costs for the training he attended from 5 October to 27 November 2009 is a subject matter of proceedings before the Social Court of Cologne that are still pending. Secondly, the failure to grant benefits in the form of a personal budget is a subject matter of proceedings before the Social Court of Cologne, lodged at first instance on 24 September 2012, and still pending. Thirdly, the author's son has failed to raise the generalized allegations concerning the application of social legislation in the courts and therefore did not provide any possibility for the courts to review and, where appropriate, to remedy his complaint.

3.5 In response to question (a),[8] the State party submits that the issue of discrimination was not raised by the author's son before the domestic courts, whereas he was entitled to do so, and procedures were available. It maintains that Social Courts are obliged to investigate the facts ex officio whenever the petitioner lodges a lawsuit.

3.6 As to the assumption of costs for the training course that the author's son attended in November 2009, the State party submits that according to the legislation in force at the time, potential employees could be supported to undertake training necessary to integrate them, if: advice was provided by the employment agency prior to participation; the training institution was authorized for such trainings; and the training institution submitted the training coupon to the agency before the initiation of the programme. The author's son attended the course without consulting the agency and afterwards requested reimbursement of the costs. The claim was rejected as it was not possible to issue a training coupon retroactively. The author's son filed a lawsuit; the proceedings were largely inactive between mid-2010 and the end of 2011. His "motion of challenge for fear of bias" of 11 September 2012 was rejected on 31 October 2012.

3.7 As to the lawsuit regarding the lawfulness of refusing to grant a "personal budget" to the author's son, the State party maintains that it is unlikely that it would succeed, because the author's son several times had failed to make the necessary applications for a personal budget.

3.8 The State party maintains that the author's son has failed to employ a number of other remedies, such as complaining to the Federal Government Commissioner for Matters

[6] Committee against Torture, communication No. 22/1995, *M.A.* v. *Canada*, decision adopted on 9 May 1995, para. 4.

[7] European Court of Human Rights, *Hizb Ut-Tahir* v. *Germany*, application No. 31098/08, decision on admissibility adopted on 12 June 2012, paras. 50–55.

[8] For the list of questions referred to in this section, see para. 1.3 above.

relating to Disabled Persons;[9] the Commissioner for Matters relating to Disabled Persons in North Rhine-Westphalia; the commissioners and coordinators for matters relating to disabled persons at the local level in Euskirchen or in Siegburg; or the Federal Anti-Discrimination Agency.

3.9 In response to question (b), the State party submits that the alleged discrimination against the author's son was not investigated by the courts because there was no reason to do so. The subject matter of the lawsuit filed by the author's son was whether he had a "right to a tied discretionary decision to obtain a binding agreement on the part of the employment agency on the amount of the integration subsidy for a potential employer". It was merely a matter of whether the law allows such a claim and whether the person of the petitioner satisfied the prerequisites. The Social Court of Cologne rightly notified the author's son that it was not him who was entitled to the right to an integration subsidy, but a potential employer. The amount and duration of any such integration subsidy depend on the concrete circumstances of the employment relationship, so that an "advance decision" on the part of the employment agency is neither provided for by law, nor possible. The request for a declaratory judgement that an employer willing to appoint the author's son would be entitled to a familiarization grant "is also not successful for lack of any interest in a finding". The Regional Social Court rightly shared the legal view of the Social Court of Cologne. The State party maintains that the alleged discrimination was "immaterial for the legal dispute" since, as an employee, the author's son had no right to the employer benefit "integration subsidy".

3.10 The State party submits that the allegations of the author's son that he was being discriminated against by the statutory provisions because of his disability "were not suited to give rise to a review of section 219 of [book] III of the Social Code [...] with regard to its compatibility with the Basic Law". A court may review "the validity of a statute which is vital to the constitutionality of a ruling" via specific proceedings before the Federal Constitutional Court under article 100, paragraph 1, of the Basic Law. This is conditional on the court itself being convinced that the provision is unconstitutional. In the view of the courts, there was no need to review the question of the unconstitutionality of section 219, book III of the Social Code with regard to a potential violation of article 3, paragraph 3, sentence 2 of the Basic Law, in accordance with which no person may be disfavoured because of disability. The State party submits that "section 219 of book III of the Social Code, old version, is a provision which, with regard to the amount and duration of the promotion, provides for larger subsidy amounts for particularly badly affected people than for employees with obstacles to placement and for persons with severe or other disabilities". No discrimination "was recognisable within the meaning of Article 3(3), sentence 2 of the Basic Law"; rather, this particular subsidy was intended to alleviate the disadvantages which are suffered by persons with severe disabilities who are "particularly badly affected" on the labour market.

3.11 With regard to the alleged erroneous information in the files of the author's son, the State party submits that he should have pursued the available legal remedies. In order to enable the petitioners to carry out the preparation of a potential legal dispute in an informed manner, the authority must grant inspection of the files related to the administrative proceedings, as well as to the simple administrative acts (Social Code, book X, section 25,

[9] The State party submits that under section 15, paragraph 1, of the Act on Equal Opportunities for Disabled Persons the task of the Commissioner is to ensure that the federal Government provides equivalent living conditions for people with and without disabilities in all areas of social life; he/she does not provide legal advice, may not interfere in pending court or administrative proceedings and has no powers to issue instructions to authorities, but can request the facts to be re-examined in individual cases.

paragraph 1, sentence 1). However, the author's son has neither applied to inspect the files, nor initiated court proceedings.

3.12 In response to question (c), the State party submits that, contrary to the statements made by the author in her comments of 5 February 2013, her son benefited from a "holistic placement measure" in the period from 1 April to 2 July 2009, planned to last for six months, allocated by the Brühl Employment Agency. In accordance with section 37, book III of the Social Code, the employment agency is permitted to commission third parties to support or implement parts of tasks related to placement. In this case the measure was carried out by Tertia GmbH. The aim was to place unemployed persons in need of activation and support, and those with obstacles to placement, on the labour market. The content of the measure included an internship of several weeks in a company, intended both to facilitate integration and to provide experience. The author's son told the Brühl Employment Agency, in an advisory meeting which took place on 12 May 2009, that he was satisfied with the scheme, but he discontinued it early when he moved from Euskirchen to Rheinbach. The move, which placed the author's son within the remit of the Bonn Employment Agency, did not have to lead to the discontinuation of the scheme and he was informed accordingly.

3.13 Immediately after having moved to Rheinbach, on 2 July 2009, the author's son attended an advisory meeting with the Bonn Employment Agency and was provided with a placement voucher to receive guidance from the IFD. The author's son handed the voucher to the IFD on 6 July 2009. Because of the discontinuation of the payment of unemployment benefits to the author's son, the placement voucher became invalid as of 6 August 2009. At that time guidance could only be provided by the IFD if a valid placement voucher existed and the latter was contingent on drawing unemployment benefits. In the case of the author's son, the application for unemployment benefits of January 2009 was decided on the basis of the documents submitted by him and he was allowed to claim such benefits for 180 days. It was only in the objection proceedings in December 2009 that the author's son provided a further work certificate, on the basis of which his right to unemployment benefits was extended until 6 February 2010. The author's son was informed of this by an "alteration notice" of 28 January 2010. It was no longer possible to change the fact that the placement voucher had previously become invalid. A further placement voucher could have been issued only for the period from 28 January 2010 to 6 February 2010. The State party maintains that, in December 2011, the legislature made the law more flexible in favour of the persons concerned.

3.14 In a discussion held on 14 September 2009, an advisor recommended that the author's son apply to the agency responsible for basic security benefits for (employable) job-seekers, to request a placement voucher to receive guidance from the IFD. The author's son made no such application. In the same discussion, a four-week in-company training scheme was agreed.

3.15 In response to question (d), the State party submits that the range of benefits in employment promotion in accordance with book III of the Social Code is highly differentiated and multifaceted. However, as a matter of principle, unemployed persons with disabilities are not dealt with differently from unemployed people without a disability; they are not subject to a special separate system of employment promotion. It is only when disability gives rise to a special need in comparison to people without a disability that there is provision for specific benefits. In particular, benefits may be provided to persons with disabilities to promote their participation in working life as required by the nature or gravity of the disability, and to conserve, improve, create or restore their earning capacity (Social Code, book III, section 112, paragraph 1).

3.16 The State party submits that the benefits to promote employment are divided into general and special benefits. General benefits are to be claimed as a matter of priority.

These are not tailored from the outset to the special needs of persons with a disability, and are also available to persons without a disability.[10] The special benefits,[11] which can also be provided on application as a part of a personal budget, are to be provided instead of the general benefits, in particular to promote basic and further vocational training. The specialized training programmes available in this framework are individualized. Needs are discussed and ascertained in an individual advisory meeting.

3.17 The State party clarifies that special benefits can also be implemented by a competent institution or jointly by several institutions through a personal budget.[12] The personal budget is not a separate benefit, but an alternative form of benefit provision. It is intended to enable the beneficiaries to decide what benefits they wish to take up at a specific time, who is to provide the necessary benefit or assistance, and how this is structured. Personal budgets usually are monetary payments paid on a monthly basis. The rehabilitation institutions, the long-term care insurance funds and the IFD are involved in providing this budget, depending on the individually ascertained needs, as a "bundled benefit".

3.18 The State party submits that, on 11 May 2012, the author's son lodged an application for a personal budget. The author's son did not respond to an invitation for an advisory meeting from the Brühl Employment Agency, on 13 June 2012. He stated in a fax that he did not intend to accept any invitation until his situation had been legally clarified, and he failed to submit an application for a personal budget before the two officially set deadlines (20 June and 30 June 2012) had expired.

3.19 In response to question (e), regarding the activities undertaken by Brühl Employment Agency, the State party submits that at a meeting held on 22 January 2009, the need for an integration subsidy was ascertained, discussed and agreed, in the event the author's son takes up employment. A statement on the amount and duration of the subsidy was not possible at that stage, since it required the individual integration requirements to be known in relation to a concrete workplace. The Brühl Employment Agency has not received an enquiry regarding the provision of a subsidy for the author's son.

3.20 Regarding the activities undertaken by the Bonn Employment Agency, the State party reiterates the facts related in paragraph 3.13. It clarifies that the placement voucher was "an additional offer for the integration of unemployed persons" in the labour market.

3.21 On 18 November 2009, the author's son wrote that he was unable to attend the next advisory session because he was currently attending further training that had not been coordinated with or approved by the employment agency. Since this was the third time that he had cancelled appointments, he had been informed that failure to attend an appointment without an important reason would lead to his removal from the register, and that as the training had not been coordinated with the agency, he was considered to be no longer available for the labour market and removed from the register as of 19 November 2009.

3.22 In response to question (f), the State party submits that at times the author's son was not willing to cooperate with the State agencies. It maintains that "his commitment to his own vocational advancement deserves recognition, but the high-handedness of his conduct towards the employment agency prevented concerted, holistic guidance being provided by

[10] The State party submits that general benefits (Social Code, book III, sections 113, para. 1, and 115) include benefits for activation and vocational integration, benefits for the promotion of preparation for work and vocational training, including vocational training grants, benefits to promote further vocational training and benefits to promote taking up self-employment.

[11] Social Code, book III, section 117, para. 1.

[12] Social Code, book IX, section 17, paras. 2 and 3.

the employment agency". In order to guarantee effective work placement, section 138, paragraph 1 of book III of the Social Code requires the availability of unemployed persons for an eventual job placement. Eligible persons of working age may not leave without permission the area in which they can rapidly respond to enquiries. Permission is to be granted as a matter of principle if there is an important reason to be outside this area. Permission can also be granted for a period of three weeks per calendar year without any important reason being given. On 30 March 2009, the author's son applied to leave the area from 31 March to 3 April 2009, but he left the area before a decision was taken as to whether to grant him such permission.

3.23 Further, on 19 April 2009, the author's son stated by e-mail that he would be in employment for fewer than 15 hours per week, for four weeks, starting on 20 April 2009. The State party maintains that such independent action on the part of the author's son was "harmful to the successful implementation of the placement measure". Further, he failed to comply with a personal invitation to attend an information event on 4 June 2009. It was not until 15 June 2009 that he submitted a sick-leave certificate for the 4 June 2009 appointment. He also failed to attend an appointment on 10 June 2009 to which he had been invited on 4 June 2009. The State party further refers to the failure of the author's son to appear at meetings and to submit documents in 2011 and in 2012.

3.24 In response to the request for information on employment offers,[11] the State party submits that, on 12 October 2011, the author's son received via Brühl Employment Agency a "job offer" from Thomas Philipps Sonderpostenmarkt. Although he had stated in a letter dated 24 October 2011 that he did not require any further activities on the part of Brühl Employment Agency, three more "job offers" were sent to him, but he failed to apply for two of them.

3.25 In response to the request for information regarding the case files, the State party submits that the files of the author's son were not lost at any time, but that "it was merely unclear between mid-May 2011 and mid-July 2011 as to where the files were". By a letter of 11 July 2011, the Brühl Employment Agency stated that the four volumes were with it and forwarded the documents to the Social Court of Cologne.

3.26 In response to the request for information on the integration subsidies, the State party submits that the inclusion of persons with disabilities in the labour market is a fundamental concern of its policy. Persons with disabilities have access to a differentiated system encompassing a large number of State benefits in order to enable them to gain employment. Both public and private employers are statutorily obliged to carry out various measures aiming at their inclusion in the labour market. The State party maintains that the author's son was and remains entitled to all tools provided for in book III (on employment promotion) and book IX (on rehabilitation and participation of persons with disabilities) of the Social Code that "are expedient for him".

3.27 The State party explains that on certain issues, the administration is granted discretion to decide how to implement the law and that this discretion must be "in line with the purpose of empowerment and comply with the statutory limits of discretion". Violations of the above rule would be: exceeding discretion; "underachieving of discretion if the administration has assessed its discretion too narrowly"; failure to exercise discretion; abuse or misuse of discretion "if the aspects relevant to the exercise of discretion according to the law are not taken into account, or not all aspects, or not sufficient aspects, are considered, or if improper or inadmissible aspects are considered, or indeed if the relevant facts are not fully ascertained". There is a legal right to the duty-bound exercise of

[11] For a list of the requests for information, see para. 1.4 above.

discretion (Social Code, book I, section 39, para. 1). The control of administrative discretionary decisions is implemented by the court.

3.28 The State party submits that persons with disabilities have a right to be provided with information and advice on the selection of an occupation, on the possibilities of vocational training and on employment benefits.[14] Additionally, persons with disabilities have a right to job-placement benefits, which are intended to bring them and employers together in order to establish a training or employment relationship. Jobseekers with severe disabilities have absolute priority in that regard.[15] Possible benefits are: a placement budget to help the unemployed persons initiate or take up employment subject to compulsory insurance, the reimbursement of application costs incurred in compiling application documents, the meeting of travel expenses to attend interviews, the granting of travel subsidies for commutes between home and work, payment of separation costs and moving assistance. Such benefits are awarded at the discretion of the employment agency. Another possible benefit is the payment to an employer of up to 80 per cent of the training allowance for a person with a disability. Employers with 20 staff or more are obliged to employ persons with severe disabilities in at least 5 per cent of posts, regularly give account to the administration on the employment of persons with disabilities and pay a compensatory levy in case of breaches of their obligation. The wages for a time-limited trial employment of persons with disabilities can be assumed for up to three months if this increases the likelihood of their participating in working life.

3.29 The State party further submits that if persons with disabilities are unable to satisfy the requirements of a job because of their personal circumstances, and if they would not have been appointed without an additional payment, an integration subsidy may be granted to the employer for a promotional period of up to 24 months, to cover up to 70 per cent of the wage (Social Code, book III, sects. 88–92). The promotional period for particularly severely disabled persons may be up to 60 months and up to 96 months if they are 55 or older.

3.30 The State party also submits that employers who employ persons with disabilities are obliged to guarantee security and health protection and a barrier-free working environment which must be accessible and useable without external assistance.[16] The IFD may give employers monetary payments for suitably equipping work and training places for persons with severe disabilities. The IFD provides support when it comes to familiarization in situ and provides employers and employed persons with disabilities with advice and assistance in applying for benefits. Employed persons with disabilities may receive monetary payments to enable them to reach their workplace or to acquire, maintain and undergo training in the use of technical aids. Employed persons with a severe disability are entitled to the assumption of the cost of any necessary work assistance (regularly recurring support on the part of another staff member commissioned by themselves).[17] Self-employment can be supported in the shape of loans or start-up subsidies; if a licence is necessary to exercise an independent activity, persons with severe disabilities should be given the licence as a matter of priority. Further, employees with disabilities may only be dismissed with the prior consent of the IFD. Employers are eligible for financial promotion

[14] The State party refers to sections 29–31 of book III of the Social Code in conjunction with section 104, paragraph 1, of book IX of the Code.

[15] The State party refers to book III of the Social Code, section 35, paragraph 1, sentence 1, read in conjunction with book IX of the Code, sections 104, paragraph 1, and 122.

[16] The State party refers to section 3a, paragraph 2, of the Ordinance on Workplaces and section 81, paragraph 4, sentence 1 of book IX of the Social Code.

[17] The State party refers to section 33, paragraph 8, of book IX of the Social Code and section 19 of the Ordinance on the Compensatory Levy for Persons with Severe Disabilities.

to overcome and prevent health-related incapacity for work. Employees with a severe disability are upon request released from work outside the statutory eight-hour working day and have a right to five additional leave days per year.

3.31 The State party submits that the author's son was advised about all existing benefits to guarantee the security and health protection of persons with disabilities, taking into account their special needs, and a barrier-free working environment which must be accessible and useable without external assistance.[18] However, the State party argues that the author's son did not attend some of the discussions at the Brühl Employment Agency. It further submits that at a meeting on 1 February 2011, and in a letter dated 24 October 2011, he referred to the communication pending before the Committee and requested the postponement of "further agreements regarding the job placement" until his legal situation was clarified and the Committee made a final decision.

Author's further submission

4.1 On 20 July 2013, the author contests that State party's submission that her son withdrew the lawsuit he had filed before the Regional Social Court because it was inadmissible, and reiterates that it was withdrawn because the Court had threatened to impose an even greater fine in case of non-withdrawal.

4.2 The author contests that State party's submission that her son attended a training without consulting the Bonn Employment Agency (see para 3.6 above) and maintains that on 31 August 2008 he had filed a formal request with the agency and asked for a notification, but that he received no reply.[19] She reiterates that a lawsuit on the issue had been pending in the Social Court of Cologne since 26 February 2010 and that a hearing was scheduled for 23 July 2013 (3.5 years after filing the case).

4.3 The author contests the State party's submission that her son can claim a personal budget and that he had failed to submit an application form for the grant of a personal budget. She submits that, on 24 September 2012, he filed a request for a budget to the employment agency. The agency sent him the wrong request form (request for rehabilitation), "in order to deny the process due to a failure to cooperate". Her son informed the employment agency of this fact in writing several times. She also maintains that the employment agency falsely stated that the author's son could claim a budget associated with a rehabilitation programme, as he had already been denied such a programme in Bonn in 2009 with the argument that his rehabilitation had already been completed in 2007.[20] The author further submits that the State party is prejudging the outcome of the case filed to the Social Court in relation to the issue of granting a personal budget (see para. 3.7 above).

4.4 The author contests the State party's statement that the essential concern of her son was the granting of an integration subsidy to a potential employer, whereas the intent of the communication is to create transparency "so that the non-discrimination rule can be applied for disabled persons, when they apply for a job"; to establish that participation in working life and integration into the labour market are not only a right of an entrepreneur but also a right of a disabled person; to ensure that assistance for integration into the labour market is no longer restricted to cases in which the employee may at the end of the eligibility period

[18] The State party refers to section 3a, paragraph 2 of the Ordinance on Workplaces and section 81, paragraph 4, sentence 1 of book IX of the Social Code.

[19] The author submits a copy of the request.

[20] The author submits in evidence notices from the employment agency dated 10 August 2009 and 12 August 2009.

provide full working capacity, and to prevent unequal treatment by the federal State system in Germany.

4.5 The author submits that information regarding the problems her son faced during his schooling and vocational training was included to illustrate the resistance to integration he was facing. She maintains that laws cannot mandate inclusion if "those governing do not truly believe it possible" and that "discrimination will not end by appointment".

4.6 The author contests the State party's submission regarding the imposition of costs for "wanton" lawsuits, maintains that the threat to impose a "fine" on her son for continuing with the lawsuit resulted in him having no legal recourse when it comes to integration into the labour market and that he was "punished for pointing out this situation".

4.7 With regard to the State party's submission that the author's son failed to exhaust judicial remedies, the author submits that even the European Court of Human Rights allows the initiation of a case if the domestic remedies cannot be exhausted.

4.8 The author contests the State party's submission that her son never received employment offers. She submits that while her son was assigned to the Tertia service provider, he had found part-time employment and that the employer was offering him a position. However, she argues that when the employer contacted the employment agency, he was told that he would be reimbursed for a training period of a few months and there would be no integration subsidy for the reduced working capacity of the author's son. The employer withdrew the offer.

4.9 The author contests the State party's submission that she had not substantiated that her son had been "placed in an inappropriate measure". She refers to the placement of her son into a scheme implemented by the service provider Tertia, which was cancelled by the Bonn Employment Agency, with the motive that it was not suited for a person with a disability and the service provider was not qualified to work with persons with disabilities.[21] She contests the submission that the scheme included an internship of several weeks in a company. The author further contests the State party's submission that the vocational training in which her son participated from October 2007 to January 2009 was provided by the employment agency. She submits that, on 1 October 2007, her son signed a private vocational training contract with the owner of the EDEKA supermarket. In response the employment agency discontinued the rehabilitation measure and th owner received no integration support, despite having made a formal application.[22] She reiterates that the inter-company training that was provided by the State party from September 2005 to September 2007 was not appropriate, because her son was assigned to a training provider who had no permission to train persons with disabilities.

4.10 The author submits that she is pleased that the case files of her son had reappeared.

4.11 The author contests the State party's submission that her son had failed to complain to courts regarding discrimination and maintains that in his submissions to the Social Court of Cologne and the Regional Social Court in Essen he detailed his discrimination allegations. Neither the Social Court of Cologne nor the Regional Social Court in Essen took a position on those accusations. She submits that in the lawsuit filed on 26 February 2010 with the Social Court of Cologne regarding the reimbursement of continuing education costs he also testified extensively regarding the procedures and discrimination at the employment agency. She further submits that the State party contradicts itself, by first stating that her son failed to

[21] The author submits in evidence a memo from the Bonn Employment Agency, dated 3 July 2009, stating that Tertia is unable to cope with persons with disabilities (partial translation provided by the author).

[22] The author submits as evidence a memo from the employment agency dated 26 January 2009.

exhaust judicial remedies and then stating that there was no reason for the Social Court to examine possible discrimination (see paras. 3.5, 3.9 and 3.10 above).

4.12 With regard to the State party's submission that the author's son failed to complain to other existing institutions that could have addressed the discrimination allegations, the author submits that, on 6 September 2010, her son wrote to the federal Institute for Human Rights, but never received a reply. She maintains that neither the Federal Anti-discrimination Agency nor the federal Institute for Human Rights can change a law. She submits that, on 5 June 2009, her husband contacted the Regional Disability Officer, who referred them to the IFD representative in Euskirchen. A meeting with the IFD representative took place on 26 June 2009, in which the latter stated that she was contractually bound to the Euskirchen Employment Agency and that she needed allocation of funds from them in order to work on the case of the author's son. On 23 November 2009, the author and her son met with the Chair of the IFD for the state of North-Rhine-Westphalia, together with the head of the IFD for Rhineland. The officials explained that the IFD cannot intervene in the procedure for granting the integration subsidy from the employment agency (Ministry for Labour and Employment); and that the programmes of the Social Integration Department (Ministry of Social Affairs) were not accessible to her son, who is depending on the employment agency (Ministry for Labour and Employment).

4.13 The author contests the State party's submission that "persons with disabilities who are unemployed are not dealt with differently from the outset than unemployed people without disability" and that "in accordance with the principle of inclusion, unemployed persons with disability are not subject to a special separate system in employment". She maintains that there is obvious discrimination between disabled and non-disabled persons and that her son cannot "apply for a job on equal terms". She also reiterates that there is obvious discrimination against the disabled who fall under the remit of the Labour Ministry in comparison with those who fall under the remit of the Social Ministry. She also reiterates that many of the measures described by the State party (see paras. 3.15–3.18 above) are not applicable to her son with his completed professional training, and are instead intended for disabled persons who fall under the remit of the Social Ministry.

4.14 The author contests the State party's submission pertaining to the conduct of her son (see paras. 3.22–3.24 above). With regard to the "accusation" that he did not inform the employment agency after finding a job, she submits that her son had found employment on an hourly basis, he was permanently on call and was often informed that he would be working the next day late the previous evening. She further submits that at the time he was not receiving unemployment benefits. She also submits that the State party views her son's efforts for inclusion as "noncompliance and deserving of punishment". She further contests the State party's submission that her son failed to obtain permission to go on a three-day vacation and maintains that he reported his intention as required to the employment agency. He was punished with withdrawal of unemployment benefits. With regard to the information that her son did not attend a meeting on 4 June 2009, she submits that she had personally informed the employment agency that her son was ill and that later he submitted a sick leave certificate to an employee of the agency, who failed to pass it on to the responsible office. Her son again lost his unemployment benefits and was able to regain them only after filing a complaint with the Social Court. With regard to the submission that he failed to attend meetings in October/November 2009, the author submits that at the time her son was attending a cashier's course in Karlsruhe and that he had informed the agency accordingly. She further maintains that her son responded to every invitation for a meeting with the employment agencies, and that it is humiliating when a person with a disability and his family are told at each meeting that he will never find work and that he has no right of participation. She maintains that the agency is accusing her son of lack of cooperation in order not to admit that the Social Code prevents the integration of persons with disability in the labour market; that whenever she and her son inquired about equal treatment of disabled

persons and transparency in the decisions, the discussions with the employment agency became difficult and aggressive. She maintains that, contrary to the State party's submission that her son was uncooperative and "high-handed", over the years he had repeatedly demonstrated that he was cooperative and reliable. She submits that the psychological assessment carried out by the employment agency stated that her son was a polite and open young man; that her son had successfully completed the professional preparation year at the employment agency with good results; that he had the best possible grades for reliability, motivation and cooperation in his vocational school certificate; that the references at the end of his vocational training period testified to his good behavior and his willingness to cooperate.[23]

4.15 The author considers that the State party uses the term "job offer" in a misleading manner, because in reality it refers to general vacancies. She further considers that when the employment agency sent such vacancies to her son, it was fully aware that his applications would fail, because the potential employers would be refused integration subsidies. She submits that her son had decided to wait until his legal status was clarified before applying for more jobs.

4.16 The author points out that according to the State party's submission, matters pertaining to persons with disability are merely a "concern" but not a "right" (see para. 3.26 above). She notes that the State party "conceals" the fact that two different ministries with differing duties and objectives are responsible for matters related to persons with disabilities and maintains that the above regularly leads to discrimination against them.

4.17 The author contests the State party's submission that her son had all the tools at his disposal provided for in books III and IX of the Social Code (see para. 3.26). She maintains that such rights are provided only to those who have the right to participate in working life and fall under the remit of the Social Ministry, and that her son falls under the "remit of the Labour Ministry". The author refers to the State party's submission that employment agencies may exercise their discretion only within the framework of the law (see para. 3.27) and submits that, since discretion is not legally defined, it allows officials a wide scope of action and leads to discrimination. She further submits that her son was "not even subject to discretion as the Social Code indirectly prohibits participation" because the employment agency is required to grant financial support to employers only if it is determined that full work capacity can be restored within three years.

4.18 The author submits that a number of the benefits described by the State party in its submission (in particular those described in paras 3.27, 3.28 and 3.30 above) are not applicable to her son. She submits in particular that he was denied the opportunity to participate in "time-limited trial employment". She also reiterates that, contrary to the State party's submission (see para. 3.29 above), an integration subsidy cannot be granted if the full working capacity of the beneficiary may not be restored within three years.

4.19 The author lastly submits that the principle of equal treatment (in accordance with article 3, paragraph 1, of the German Constitution) does not entitle her son to integration support by the employment agency because such support is provided by the IFD. She considers that in a federal State, the principle of equal treatment is only partially valid.

[23] The author submits a copy of the positive reference given to the author upon completion of his vocational training.

Issues and proceedings before the Committee

Review of admissibility

5.1 The Committee notes the State party's submission that the issue of discrimination was not raised by the author's son before domestic courts. It observes, however, that the issue was raised by the author's son in his 9 February 2010 lawsuit before the Social Court of Cologne on the matter of issuing a binding decision on the amount and duration of the integration subsidy and in his appeal to the Regional Social Court, and reiterates its finding that it is not precluded from considering the communication under article 2 (d) of the Optional Protocol. The Committee notes the State party's submission that the author and her son could have addressed a number of non-judicial institutions with complaints, but observes that the State party has failed to demonstrate how the said proceedings would have constituted an effective legal remedy for the alleged violations of the rights of the author's son. In the circumstances, the Committee finds that it is not precluded from considering the communication under article 2 (d) of the Optional Protocol.

5.2 The Committee further notes the State party's submission that proceedings before the Social Court of Cologne regarding the assumption of costs for a training the author's son attended in 2009 and regarding the issue of whether he was entitled to a personal budget were still pending. The Committee, however, recalls that the issue before it is to decide whether the State party has complied with its obligation to facilitate the inclusion of a person with disabilities into the labour market in accordance with articles 3, 4, 5 and 27 of the Convention, and is therefore not the subject matter of the proceedings pending before the Social Court of Cologne.

5.3 As a consequence of the above, the Committee sees no need to revise its admissibility decision.

Consideration of the merits

6.1 The Committee on the Rights of Persons with Disabilities has considered the present communication in the light of all the information received, in accordance with article 5 of the Optional Protocol and rule 73, paragraph 1, of the Committee's rules of procedure.

6.2 The Committee takes note of the author's allegations that the provisions of the social legislation related to granting an integration subsidy are discriminatory, since they are applicable only to persons with disabilities whose full working capacity may be restored within 36 months; that they create no rights for the disabled person, since the right to claim such a subsidy belongs exclusively to the employer; and that the manner in which discretion is applied in implementing those provisions by the employment agencies leads to further discrimination. The Committee also takes note of the State party's submission that the author's son is eligible for such an integration subsidy, should the legal conditions for allocating it be met. The legal conditions appear to be that an employer should make a binding employment offer to the author's son and apply for the integration subsidy, after which the employment agency shall evaluate the situation and take a decision on the duration and amount of the integration subsidy to be allocated. In any case, according to the State party's submission, the subsidy would amount to a maximum of 70 per cent of the wages, for a maximum period of 60 months (see para 3.29 above). The Committee observes that the intention behind the above-mentioned integration subsidies scheme appears to be to encourage private employers to hire persons with disabilities. The Committee observes, however, that the said scheme in practice requires employers to go through an additional application process, the duration and the outcome of which are not certain, and that the disabled person has no possibility to take part in the process. The policy seems to respond to the medical model of disability, because it tends to consider disability as something that is transitional and that, in consequence, can be "surpassed or cured" with time. The policy

is not consistent with the general principles set forth in article 3 of the Convention, read together with paragraphs (i) and (j) of the preamble. The Committee also notes that general benefits, that are predetermined and presumably known to employers, exist to promote the employment of recent graduates without disabilities (see para. 3.16 above). The Committee also notes that, in the case of the author's son, the above scheme appears to have served as a deterrent, rather than as an encouragement for employers. The Committee notes that article 27 of the Convention implies an obligation on the part of States parties to create an enabling and conducive environment for employment, including in the private sector. The Committee further observes that article 4, paragraph 1 (a), of the Convention imposes on the State party the general obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention related to work and employment. It also observes that article 3 establishes that in its legislation, policies and practice the State party should be guided by respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; and equality of opportunity. In the instant case, the Committee is of the view that the existing model for the provision of integration subsidies does not effectively promote the employment of persons with disabilities. The Committee finds in particular that the apparent difficulties faced by potential employers when trying to gain access to the integration subsidy that they are entitled to for the employment of a person with disabilities affect the effectiveness of the integration subsidies scheme. The already mentioned administrative complexities put applicants in a disadvantageous position and may in turn result in indirect discrimination. The Committee therefore considers that the integration subsidies scheme, as applied in the case of the author's son, is not in accordance with the State party's obligations under article 27, paragraph 1 (h), read together with article 3 (a), (b), (c) and (e), article 4, paragraph 1 (a) and article 5, paragraph 1, of the Convention.

6.3 The Committee notes the author's submission that the integration subsidy is the only affirmative action available to assist her son for his inclusion in the labour market. The Committee also takes note of the State party's submission regarding the wide variety of measures provided for by its legislation and the statement that the author's son remains entitled to all tools from the books of the Social Code on employment promotion and on rehabilitation and participation of persons with disabilities that "are expedient for him". The Committee, however, observes that the State party does not specify which of those measures are applicable in the case of the author's son. The Committee further observes that in reality the measures applied by the State party's authorities to assist his integration into the labour market amounted to: granting unemployment benefits for unspecified periods of time; holding counselling meetings; and controlling whether the author's son remained in the geographic area to which he was assigned and whether he regularly appeared for meetings. The authorities also provided the author's son with job vacancies, some of which were outdated, and included him in a "holistic placement measure" to which he was assigned by the Brühl Employment Agency and which appears to have been discontinued by the Bonn Employment Agency. The Committee further observes that the State party appears to hold the opinion that the efforts of the author's son to increase his qualifications through further education and the fact that he had at times taken part-time employment constitute a hindrance to the efforts of the employment agencies to assist him. The Committee lastly observes that the range of measures applied to the case of the author's son was limited compared to the extensive list of available measures described by the State party. The Committee observes that article 27, paragraph 1 (d) and (e), of the Convention enshrines the rights to benefit from appropriate measures of promotion of employment opportunities, such as to have effective access to general placement services as well as assistance in finding and obtaining employment. The Committee is of the view that the measures taken by the responsible authorities of the State party to assist the integration of the author's son into the labour market did not meet the standard of the State party's

obligations under article 27, paragraph 1 (d) and (e), read together with article 3 (a), (b), (c) and (e), article 4, paragraph 1 (a) and (b) and article 5, paragraph 1, of the Convention.

7. Acting under article 5 of the Optional Protocol to the Convention, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations under article 27, paragraph 1 (d), (e) and (h), read together with article 3 (a), (b), (c) and (e), article 4, paragraph 1 (a) and (b), and article 5, paragraph 1, of the Convention. The Committee therefore makes the following recommendations to the State party:

(a) Concerning the author's son: the State party is under an obligation to remedy its failure to fulfil its obligations under the Convention towards the author's son, including by reassessing his case and applying all measures available under domestic legislation in order to effectively promote employment opportunities in the light of the Convention on the Rights of Persons with Disabilities. The State party should also provide adequate compensation to the author's son, including compensation for the costs incurred in filing the present communication;

(b) General: taking into consideration that the State party's legislation on the matter was adopted before the ratification of the Convention, the State party is under an obligation to take steps to prevent similar violations in the future, including by reviewing the content and functioning of the scheme for the provision of integration subsidies to individuals who are permanently disabled, to ensure its full compliance with the principles of the Convention, and by ensuring that potential employers can effectively benefit from the scheme whenever appropriate.

8. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the present Views and recommendations of the Committee. The State party is also requested to publish the Committee's Views, to have them translated into the official language of the State party, and to circulate them widely, in accessible formats, in order to reach all sectors of the population.

[Adopted in English, French, Spanish, Arabic and Chinese, the English text being the original version. Subsequently to be issued also in Russian as part of the Committee's annual report to the General Assembly.]